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IN THE

Supreme Court of the United States.

October Term, 1951.

No. .

JAMES SINGLETON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, JAMES SINGLETON, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on January 7, 1952 and January 23, 1952.

SUMMARY STATEMENT OF MATTER INVOLVED.

This is the third in a series of petitions for certiorari to the United States Court of Appeals for the Third Circuit, arising from the affirmance of a judgment and sentence after a conviction for contempt of court in refusing to answer certain questions propounded by a special grand jury for the United States District Court for the Eastern District of Pennsylvania, sitting in Philadelphia. In the first case of the series, *Hoffman v. United States*, 341 U. S.

479, 71 S. Ct. 814 (1951), the judgment and sentence of the court below was reversed. In the second case, *United States v. Greenberg*, 187 F. 2d 35, certiorari was first allowed and the case was remanded to the Court of Appeals on June 4, 1951, 341 U. S. 944, 71 S. Ct. 1013, for "reconsideration in the light of *Hoffman v. United States.*" After remand, the *Greenberg* case and the instant case, the appeal of which was then pending, were reargued on the same day before the same court. After reaffirmance of the *Greenberg* judgment, this Court again allowed certiorari, January 28, 1952, 342 U. S. 917. Except for one new question of law, the issues presented in the instant case are the same as those which were present in the *Hoffman* case and which are present in the *Greenberg* case.

The facts involved in the instant case are as follows: On the early evening of November 20, 1950, petitioner was taken into custody pursuant to a writ entitled "Attachment For Witness in cause" (R. 17). The following day in the early afternoon a hearing was had before the Hon. J. Cullen Ganey, who presided over the special grand jury. Petitioner moved to dismiss the attachment under which he was held in custody or in the alternative asked the court to set bail for his appearance before the grand jury (R. 19-20).

The Government requested that bail for the appearance of petitioner as a witness before the grand jury be fixed in an amount of "at least $25,000" (R. 24). After hearing argument, the court fixed bail in the amount of $12,000 for petitioner's appearance as a witness before the grand jury (R. 27).

During the course of the argument, it was disclosed by the Government that on or about September 14, 1950 (R. 6, 7) a subpoena had been issued in the name of petitioner. On October 24, 1950, the subpoena not having been served by then, the Government had filed a petition entitled "Petition for Attachment" (R. 4) reciting the inability to serve the subpoena upon petitioner; attached to the said petition were the subpoena (R. 6) and affidavits

by three individuals reciting their efforts to make service (R. 7, 11, 13). After receiving the ex parte petition the Court issued its order on the same date directing that the United States Marshal take petitioner into custody "for the purpose of having him appear and testify as a witness before the Grand Jury" (R. 15).

On November 27, 1950, petitioner filed a motion to quash the attachment under which he had been taken into custody and pursuant to which bail had been posted (R. 28). In that motion petitioner recited facts concerning his domicile and residence in the city and county of Philadelphia to which no answer was filed by the Government. He stated that he was born in and had been a resident of Philadelphia County the entire period of his life; that during the period of time the Government alleged it had tried to serve a subpoena upon him, he had resided and continued to reside at 1254 South Hollywood Street, Philadelphia, his residence for a period of five years prior to the issuance of this subpoena; that he was daily in those premises and slept there nightly (R. 28-30). In the preliminary order submitted with the motion, petitioner asked for a rule to show cause fixing a date for argument and requested a stay of proceedings, the issuance of which would have prevented the Government from requiring petitioner's appearance before the grand jury until the disposition of the motion to quash (R. 33, 36, 37, 68-69). The court specifically rejected the request for a stay of proceedings. Accordingly it was stricken from the preliminary order submitted, whereupon the court granted a rule to show cause returnable December 4, 1950 (R. 42, 72-73).

The following day, November 28, 1950, petitioner was called before the grand jury and questions were propounded to him. Many questions were answered; others petitioner refused to answer asserting the protection of the Fifth Amendment against self-incrimination. On November 29, 1950, petitioner was directed by the court to answer all of the questions. Again, he was taken before the grand jury;

this time petitioner answered all of the questions except three which related to the business activities of three named individuals, again asserting the constitutional privilege against self-incrimination. Each of these three questions concerned the business activities of a separate individual. The questions were framed either "What does he do?" or "What business is he in?", and referred to George Pasquale, Joe Pasquale, and Marty Singleton (R. 91-94).

On November 30, 1950, a presentment for contempt for refusal to answer these three questions was filed before the court (J. Cullen Ganey, J.) and trial was fixed for December 4, 1950, the same date on which the argument on the motion to quash had been fixed.

On December 4, 1950, petitioner's counsel argued in support of the motion to quash the attachment. The argument before the court carried over until the next day, December 5 when the court denied the motion and directed that the contempt trial start immediately (R. 125).

During the course of the trial, defendant made various motions in an effort to have introduced as evidence certain portions of the grand jury transcript and certain papers or documents in the hands of the Government which petitioner asserted would or might demonstrate that his answers to the questions propounded were likely to form vital links in the proof of a conspiracy in which he was involved. Specifically, the motions were:

1. To inspect that portion of the Grand Jury transcript which contained questions and answers concerning either petitioner or the three individuals concerning whose business he was questioned (R. 127, 130);

2. To require the Government to secure and admit certain facts on behalf of the office of the Collector of Internal Revenue concerning the filing by petitioner of income and other tax forms and returns (R. 130-134);

3. To offer into evidence the Government's file on petitioner which was produced in court by virtue of the subpoena duces tecum served by petitioner (R. 166-167).

All of these motions were denied (R. 128, 130, 134, 167).

Each of the papers or documents requested by petitioner and denied to him were offered to the trial judge *in camera*. The papers were marked for identification and impounded by order of the court, never having been shown to or seen by petitioner or his counsel (R. 203). These impounded exhibits are identified for the record as follows: Exhibit No. 1, the transcript of the grand jury containing all of petitioner's testimony (R. 76-77); Exhibit No. 3, an "Anonymous letter" (R. 181, 183, 189); Exhibit No. 4, a paper termed "Background" (R. 181, 183, 189); and Exhibit No. 5, a paper termed "Singleton's Police Record"[1] (R. 184, 185, 189). Exhibits No. 3, No. 4, and No. 5 were taken from the Government file on petitioner produced in court by virtue of the subpoena served by petitioner.

The setting in the instant case, of course, was identical with that in *Hoffman v. United States*, 341 U. S. 479, 71 S. Ct. 814 (1951), except that additional facts were within the personal perception of the court at the time Singleton was tried for contempt. Hoffman was one of the very first witnesses called by the grand jury while Singleton was not called until late November of 1950, the grand jury having convened on September 14, 1950. Some of these additional

(1) Petitioner's police file was denied him during the course of this contempt trial. However, it became available to counsel by reason of the fortuitous circumstances that counsel also represented another witness, Joseph Coffey, who was questioned by the same grand jury concerning the business activity of *petitioner*. In the contempt trial of Coffey, which followed the instant trial, petitioner's police record was produced. That record was presented to the Court of Appeals at the time of reargument of the instant case and while it had not been considered by the trial judge on the merits was so considered by the Court of Appeals (R. 216). See *infra* p. 10. Unable to determine whether the impounded record is similar to or different from the form in which the record was submitted to the Court of Appeals by petitioner, petitioner's police record, in the form available to him, is attached to this brief and petition in the appendix (pp. 23-35).

facts had become available to the court by reason of the record in *United States v. Greenberg*, now pending for argument in this Court. Newspaper articles (R. 196-197 of that Record) for Thursday morning, September 14, Friday morning, September 15, and Sunday morning, October 8, 1950, noted that it was the purpose of the inquiry to extend to "rackets in all their ramifications" and "Even though there are no Federal laws regarding numbers, slot machines and other rackets, the probers will strike at such rings through the Federal revenue and conspiracy laws. . . ."

"Goldschein [the Special Assistant] himself stressed the importance of 'conspiracy' . . ."

The article stated further that agents of the Bureau of Internal Revenue were available to produce income tax returns and that "Income tax violations would permit the Government to strike indirectly at racketeers whose activities are not covered by Federal criminal statutes." The grand jury "will delve into activities of organized and syndicated 'mobs' . . ."

The *Hoffman* case itself had contained a newspaper article (Appendix No. 4 to affidavit to petition for reconsideration of allowance of bail pending appeal) from the Evening Bulletin for Friday, September 29, 1950, in which it was stated that petitioner was being sought for questioning before the grand jury, and that the Government was petitioning for the issuance of a bench warrant for his arrest. The article also noted that an individual by the name of Palermo who had also been subpoenaed to appear before the grand jury had been arrested earlier in September "along with Singleton and Coffey,[2] as the aftermath

(2) When Coffey was called as a witness before the same grand jury, he was asked what was the business activity for the year 1950 of petitioner and his nephew, Marty Singleton, one of the individuals concerning whose business activities petitioner himself was questioned. Coffey refused to answer relying upon the constitutional privilege against self-incrimination. He was convicted, sentenced to a year and a day and his appeal is presently pending before the Court of Appeals for the Third Circuit, No. 10411.

of a bloodless gun battle reportedly stemming from a numbers racket dispute."

Petitioner's police record, printed in the appendix to this petition and brief (pp. 23-35), show a police record over a period of 23 years, during the course of which petitioner has been arrested by federal authorities for a federal offense, assigned an "F. B. I." number, charged with crimes of violence, with being a known criminal and a suspicious character, and with resisting arrest; he has been tried on a conspiracy charge and arrested with a member of the Pasquale family, concerning two of whom he was questioned as to the nature of their business.

Petitioner admitted that he knew the two Pasquales, concerning whose occupations he was questioned, for a period of 12 years each (R. 88, 89). Petitioner also admitted that he was related to the third person concerning whom he was questioned, namely, Marty Singleton, the relationship being that of uncle and nephew and that Marty Singleton, the nephew, resided with petitioner at petitioner's residence, 1245 S. Hollywood St., Philadelphia (R. 89). In examination of the Special Assistant to the Attorney General, called by petitioner, it was disclosed that certain information was available to the Government showing a connection or association between petitioner and the individuals concerning whom he was questioned. The form of this information was described as "Unconfirmed reports and other statements similarly . . . Statements made to me by various and sundry people whom I can't identify and don't know" (R. 173).

Petitioner was prevented from securing additional information concerning this connection or association by reason of the trial judge's ruling sustaining an objection interposed by the Government (R. 172).

Petitioner was tried for contempt, convicted and sentenced to undergo imprisonment for a period of five months (R. 192). Upon application, he was admitted to bail pend-

ing appeal (R. 192). Promptly thereafter, the trial judge filed a formal order (R. 193-199).

An appeal was taken to the Court of Appeals for the Third Circuit which on January 7, 1952, affirmed the judgment of the lower court. A petition for reargument was filed and denied on January 23, 1952.

Petitioner now seeks to reverse the action of the Court of Appeals in affirming the judgment and sentence of the District Court and in denying the petition for a rehearing.

BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked (1) under the Fifth Amendment to the Constitution of the United States which grants the privilege against self-incrimination and (2) under the Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U. S. C. A. § 1254 (1)).

The judgment to be reviewed as above stated, is the judgment of the United States Court of Appeals for the Third Circuit, entered on January 7, 1952, affirming the judgment and sentence of the United States District Court for the Eastern District of Pennsylvania and the judgment entered on January 23, 1952, denying petitioner's request for a rehearing.

QUESTIONS PRESENTED.

1. Is it a violation of the Fifth Amendment to the United States Constitution to adjudge a witness in contempt for failing to answer certain questions before a grand jury concerning specifically named third parties, where the facts and circumstances establish that the witness was in real and genuine fear that his answers might incriminate him or furnish a link in the chain of evidence of the commission of a federal offense?

2. Was it error when the trial judge refused to consider petitioner's police record in determining whether to sustain the claim of privilege against self-incrimination?

3. When connection or association between petitioner and those concerning whom he was questioned is deemed important, was it error when the trial judge sustained objection to the introduction of such evidence?

4. Was it error to refuse petitioner's motions to have the Government produce information in its possession, reviewed by the trial judge *in camera*, the introduction of which would or might afford justification for petitioner's claim of privilege against self-incrimination?

5. Where an arrest is invalid having been made under a writ not in conformance with the order of court directing its issuance and where the order itself was based upon an ex parte petition deficient in material averments, did petitioner's appearance before the grand jury after his timely motion attacking the arrest had been overruled and his request for a stay of proceedings refused, constitute a waiver of said illegal arrest?

REASONS RELIED UPON FOR THE ALLOWANCE OF A WRIT.

1. This is the third in a series of cases arising from the refusal of the Court of Appeals for the Third Circuit to interpret and apply the constitutional protection against self-incrimination afforded by the Fifth Amendment in accordance with the decisions of this Court. In the first of those cases, *Hoffman v. United States*, 341 U. S. 479, 71 S. Ct. 814 (1951), this Court reversed that judgment and reasserted the applicable principles. While the Court of Appeals acknowledged the *Hoffman* decision, it again failed to give proper scope to the Fifth Amendment, particularly so in the light of that opinion. For the facts in the instant case, all part of the official record, are strikingly similar to those present in the *Hoffman* case. The Court of Appeals apparently thought the cases different because questions were directed to petitioner concerning third parties,

apparently overlooking that the very same situation was present in the *Hoffman* case, in (*Patricia*) *Blau v. United States*, 340 U. S. 159, 71 S. Ct. 223 (1950), and in (*Irving*) *Blau v. United States*, 340 U. S. 332, 71 S. Ct. 301 (1951).

2. The Court of Appeals acknowledged that the trial judge failed to consider evidence, which this court has held to be of the utmost importance in the determination of whether the privilege against self-incrimination should be sustained. Nevertheless, the judgment was affirmed.

The police record of petitioner was examined by the trial judge *in camera*. He stated simply and categorically that it was "not considered by this court in its final ruling and adjudication"[3] (R. 203).

The Court of Appeals held, nevertheless, that it did consider that evidence despite the fact the trial judge did not and the error was cured because that evidence "could not per se possibly form a link in an incriminating chain" (R. 216). Whether petitioner's police record could or could not "per se" form a link in an incriminating chain, is beside the point. It is for the trier of facts in the first instance to determine whether or not based upon all the available evidence, it could possibly form such a link. Since the Government has no right of appeal, if the trier of facts reconciles this issue in favor of the defendant this question would never arise before an appellate court for its determination as to whether the evidence "per se" is or is not incriminating.

In other words, the Court of Appeals substituted its judgment for that of the trier of facts. That the trier of facts in this instance was the trial judge and not a jury is unimportant, particularly where as here a jury trial, while not a matter of right, was in fact requested by petitioner and denied by the trial judge.

3. The Court of Appeals held this record lacked crucial evidence linking petitioner with the third parties concern-

(3) In all fairness to the trial judge, it should be noted that petitioner's trial was held before this Court's decision in the Hoffman case.

ing whose business activities he was questioned. Despite that, it nevertheless refused to hold as prejudicial error a ruling of the trial judge which excluded the very evidence the Court of Appeals deemed crucial and for lack of which it affirmed.

Petitioner had attempted to supply this stated deficiency of evidence during the course of the contempt trial by questioning the Special Assistant to the Attorney General who had been subpoenaed and called as a witness by petitioner. The question, objection and ruling were as follows:

> "Q. Do you have reason to believe that there is any connection between these three men and Mr. Singleton?
>
> MR. O'KEEFE: I object to that question.
>
> THE COURT: Objection sustained." (R. 172)

4. Petitioner was tried and was convicted by the Government for contempt while at the same time the Government refused to make available to him evidence in its possession which would or might demonstrate that his answers were likely to form vital links in the proof of a conspiracy in which he was involved. This practice has been uniformly and vigorously condemned by the Court of Appeals for the Second Circuit. *United States v. Zwillman*, 108 F. 2d 802 (C. A. 2d, 1940), *United States v. Andolschek*, 142 F. 2d 503 (C. A. 2d, 1944), *United States v. Beekman*, 155 F. 2d 580 (C. A. 2d, 1946), *United States v. Grayson*, 166 F. 2d 863 (C. A. 2d, 1948), *cf. Edwards v. United States*, 312 U. S. 473, 61 S. Ct. 669, 674 (1941). The instant ruling of the Court of Appeals for the Third Circuit is in direct conflict with these decisions.

This same issue is presently before this Court in the *Greenberg* case.

The error was further accentuated in this case because the evidence was made available to the trial judge *in*

camera. Since the issue was necessarily first one of *fact*, the trial judge deciding from all the evidence that there was an absence of sufficient facts showing reasonable apprehension, petitioner was denied the right to see or argue the facts available to the trial judge. This practice is also in direct contrast to the contrary holding in the Court of Appeals for the Second Circuit, *United States v. Coplon*, 185 F. 2d 629 (1950), cert. denied, January 28, 1952, 342 U. S. 920.

5. Petitioner's arrest was invalid and his appearance before the grand jury did not waive any rights, timely objection having been made and overruled.

Petitioner was arrested under a writ for contempt of court. The writ purportedly issued under an order based upon an ex parte Government petition, requesting the right to take petitioner into custody because of inability to serve him with a subpoena requiring his appearance as a witness before the grand jury.

The entire procedure was illegal and without any basis in law. The writ was not in conformance with the order of court. *Cf. Barry et al. v. United States ex rel. Cunningham*, 279 U. S. 597, 49 S. Ct. 452 (1929). The order itself was not justified under either alternative rationalized by the Government, namely Rule 46 (b) of the Federal Rules of Criminal Procedure or the contempt statute, 18 U. S. C. A. § 401. Petitioner filed his motion timely attacking the arrest and asking for a stay of proceedings to prevent his appearance before the grand jury until this issue was decided. The court refused his request for a stay and by its refusal, directed his appearance before the grand jury. The Court of Appeals held that petitioner's appearance thereafter before the grand jury was voluntary (R. 216-217). Under these circumstances, it seems obvious petitioner did not "voluntarily" appear before the grand jury. His objection to the procedure having been properly and timely made, it was preserved for appellate review. *Al-*

brecht v. United States, 273 U. S. 1, 47 S. Ct. 250 (1927). The ruling of the Court of Appeals would render meaningless Rule 12 (b) of the Federal Rules of Criminal Procedure.

This is a fundamental question which we submit should be reviewed and determined by this Court, especially in the light of the continued investigations by grand juries throughout the United States.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

LEMUEL B. SCHOFIELD,
MARVIN COMISKY,
Attorneys for Petitioner

BRIEF IN SUPPORT OF PETITION.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Third Circuit affirming the judgment and sentence of the United States District Court for the Eastern District of Pennsylvania is reported in 193 F. 2d 464.

STATEMENT OF JURISDICTION, QUESTIONS PRESENTED AND FACTS.

The Court is respectfully referred to the petition to which this brief is annexed in which the Statement of Jurisdiction, Questions Presented, and Statement of Matter Involved are set forth.

ARGUMENT.

1. On November 28 and 29, 1950, petitioner was called before and questioned by the special grand jury in Philadelphia. The exact number of questions and the scope of the inquiry we are unable to describe because petitioner's motion to have made available to him the transcript of his testimony was denied. Petitioner was tried and convicted for contempt of court in refusing to answer three questions despite his claim of the protection of the Fifth Amendment against self-incrimination. Each of these three questions concerned the business activity of a separate individual. The questions were framed either "What does he do?" or "What business is he in?" and referred to George Pasquale, Joe Pasquale, and Marty Singleton.

Petitioner asserted his claim of privilege on the very first occasion when he was asked these questions on November 28 and maintained his claim of protection against self-incrimination both before the court and again before the grand jury on November 29.

This record contains facts strikingly similar to those deemed sufficient for reversal in *Hoffman v. United States*, 341 U. S. 479, 71 S. Ct. 814 (1951). The setting, of course, was identical, except that additional facts were within the personal perception of the court at the time Singleton was tried for contempt. Hoffman was one of the very first witnesses called by the grand jury while Singleton was not called until late November of 1950, the grand jury having convened on September 14, 1950. Some of these additional facts had become available to the court by reason of the record in *United States v. Greenberg*, now pending for argument in this Court. Newspaper articles (R. 196-197 of that Record) for Thursday morning, September 14, Friday morning, September 15, and Sunday morning, October 8, 1950, noted that it was the purpose of the inquiry to extend to "rackets in all their ramifications" and "Even though there are no Federal laws regarding numbers, slot machines and other rackets, the probers will strike at such rings through the Federal revenue and conspiracy laws. . . ."

"Goldschein [the Special Assistant] himself stressed the importance of 'conspiracy' . . ."

The article stated further that agents of the Bureau of Internal Revenue were available to produce income tax returns and that "Income tax violations would permit the Government to strike indirectly at racketeers whose activities are not covered by Federal criminal statutes." The grand jury "will delve into activities of organized and syndicated 'mobs' . . ."

The *Hoffman* case itself had contained a newspaper article (Appendix No. 4 to affidavit to petition for reconsideration of allowance of bail pending appeal) from the Evening Bulletin for Friday, September 29, 1950, in which it was noted that petitioner was being sought for questioning before the grand jury, and that the Government was petitioning for the issuance of a bench warrant for his arrest. The article also noted that an individual

by the name of Palermo who had also been subpoenaed to appear before the grand jury had been arrested earlier in September "along with Singleton and Coffey, as the aftermath of a bloodless gun battle reportedly stemming from a numbers racket dispute."

A review of petitioner's police record (Appendix, pp. 23-35) is almost identical with that of the police record recited in the *Hoffman* case. Petitioner has a 23-year police record, has been arrested by Federal authorities for a Federal offense; assigned an "F. B. I." number; charged with crimes of violence; charged with being a known criminal and a suspicious character; charged with resisting arrest; tried on a conspiracy charge, and arrested with a member of the Pasquale family.

The relationship between petitioner and the persons concerning whose business activities he was questioned was established by the evidence. Petitioner admitted that he knew each of the Pasquales for a period of 12 years (R. 88, 89) and of course, his criminal record already disclosed his arrest with another Pasquale, namely, Anthony. Petitioner also recited that he was related to the third person concerning whom he was questioned, namely, Marty Singleton, the relationship being that of uncle and nephew, and that Marty Singleton, the nephew, resided with petitioner in the latter's residence at 1245 South Hollywood Street, Philadelphia (R. 89).

It is also apparent from the testimony that the Government asked petitioner concerning the business activity of these three specified individuals "with knowledge aforethought". The Government had in petitioner's file information which showed an association or connection between petitioner and these individuals. While objection to a direct question seeking this information was sustained (R. 172), nevertheless, other answers by the Special Assistant to the Attorney General who was subpoenaed and called as a witness by petitioner, disclosed that association (R. 173).

The Government's own actions indicated petitioner's notoriety as an underworld character. For the Government had not only requested petitioner's arrest on a bench warrant, but after that arrest had requested a bond of at least $25,000 for his appearance as a witness before the grand jury (R. 24). The trial judge apparently was also so impressed because he fixed a bond of $12,000 (R. 27) merely for the appearance of petitioner as a witness before the special grand jury.

A claim of privilege under almost identical circumstances was sustained in *United States v. Zwillman*, 108 F. 2d 802 (C. A. 2nd, 1940), and this record clearly requires reversal under the recent *Hoffman* (341 U. S. 479, 71 S. Ct. 814) and *Blau* decisions (*Patricia*, 340 U. S. 159, 71 S. Ct. 223; *Irving*, 340 U. S. 332, 71 S. Ct. 301).

2. The Court of Appeals erred in affirming the judgment and sentence after holding as it did that the District Judge failed in his duty to consider the police record of petitioner in disposing of the case on the merits. Realizing that the District Judge had committed error, the Court of Appeals nevertheless sought to insulate that error by itself reviewing that evidence (R. 216). Having examined petitioner's police record, the Court did not reverse because it determined in the light of that evidence a direct answer by petitioner to the questions unanswered "could not per se possibly form a link in an incriminating chain" (R. 216).

The Court of Appeals apparently overlooked the salutary language of this Court in *Blau v. United States*, 340 U. S. 159, 161, 71 S. Ct. 223: "Whether such admissions by themselves would support a conviction under a criminal statute is immaterial." Furthermore, the Court of Appeals undertook to function as a court of nisi prius, trying and determining facts. The issue is not whether the evidence *per se* forms a link in an incriminating chain, but whether considering that evidence together with the balance of the record it is not perfectly clear to *the trier of facts* (the trial judge or jury) " 'that the witness is mistaken, and

that the answer(s) *cannot possibly* have such tendency' to incriminate", *Hoffman v. United States*, 341 U. S. 479, 488, 71 S. Ct. 814, 819 (1951). If the trier of facts decides this issue in favor of defendant, then, of course, the question will never arise before an appellate court as to whether the evidence is or is not incriminating per se. The Court of Appeals by substituting its judgment for that of the trier of facts committed error.

3. For purposes of brevity and to avoid repetition, we respectfully refer the Court to the petition to which this brief is annexed where under Reasons Relied On, this error is fully discussed (3, *supra* p. 10).

4. Petitioner made a series of motions designed to have produced in evidence information, papers or documents in the possession of the Government which petitioner believed would or might indicate to the Court his reasonable apprehension, that answering the questions addressed to him would supply a link in a chain of incriminating evidence of a federal offense. The Court of Appeals for the Third Circuit, contrary to the vigorous and unanimous holdings of the Court of Appeals for the Second Circuit, denied all of those motions and permitted the Government to prosecute petitioner for contempt while at the same time it withheld evidence which would or might prove his innocence.

In *United States v. Zwillman*, 108 F. 2d 802 (C. A. 2d, 1940), this exact issue was decided in favor of the defendant and a conviction for contempt was reversed. Other decisions of the Court of Appeals for the Second Circuit have vigorously enforced and extended that holding which has now been applied not only where the requested evidence in the Government's possession comes from a defendant, his books and/or records, but also where it comes from third parties. *United States v. Andolschek*, 142 F. 2d 503 (C. A. 2d, 1944); *United States v. Beekman*, 155 F. 2d 580

(C. A. 2d, 1946); *United States v. Grayson,* 166 F. 2d 863 (C. A. 2d, 1948); *cf. Edwards v. United States,* 312 U. S. 473, 61 S. Ct. 669, 674 (1941).

The error was accentuated by the action of the trial judge in reviewing *in camera* these exhibits which were ruled inadmissible and which were unavailable to petitioner. The trial judge first had to determine as a matter of *fact* whether petitioner had a reasonable apprehension of self-incrimination before he convicted him of contempt, and in this determination, petitioner had no opportunity to argue concerning the importance or relevancy of the facts impounded. This has also been held to be error by the Court of Appeals for the Second Circuit in *United States v. Coplon,* 185 F. 2d 629 (C. A. 2d, 1950), cert. denied, 342 U. S. 920 (1952).

While we could find no decision of this Court which ruled this situation, the language and ruling in *Edwards v. United States,* 312 U. S. 473, 61 S. Ct. 669, 674 (1941), holding it was error to deny to a defendant in a criminal trial the transcript of his testimony previously given before the Securities and Exchange Commission, clearly indicates a result on this issue by this Court contrary to that reached in the instant case.

5. Petitioner's arrest was invalid. His timely objection was not waived and the subsequent proceedings including the contempt hearing were based upon a false and defective foundation all of which should be set aside.

The order of the trial judge directed petitioner's apprehension for the purpose of having him appear and testify as a witness before the grand jury (R. 15). The writ under which petitioner was arrested, not in accordance with that order, directed petitioner's apprehension on an attachment for contempt in evading service of a subpoena (R. 16-17). The writ, not having been issued pursuant to any legal order, was unlawful. Petitioner's motion made orally immediately after apprehension and in

writing thereafter (R. 19, 28) should have been sustained. A comparable situation was present in *Barry et al. v. United States ex rel. Cunningham*, 279 U. S. 579, 49 S. Ct. 452 (1929). In that case, this Court held that not the recommendation of action by a Senatorial sub-committee but the resolution of the Senate itself which directed the action was determinative of what had in fact been ordered.

There is no authority for the issuance of either a warrant of arrest or a citation for contempt in the present record. As a rationalization, the Government stated it professed to act in the alternative under Rule 46 (b) of the Federal Rules of Criminal Procedure or under the contempt statute, 18 U. S. C. A. § 401 or under both (R. 117, 121-123).

The statutory history of Rule 46 (b) proves clearly that it was not meant to authorize the issuance of a warrant of arrest without the service of a subpoena, in the absence of a preliminary hearing in the first instance where the materiality of the witness' testimony is demonstrated. See notes of the Advisory Committee to Rule 46 (b) and 28 U. S. C. A. § 657, now repealed.[4]

Furthermore, the Government made no attempt to comply with at least two essential requirements of the Rule, namely: (1) It must appear by affidavit that the testimony of a person is *material*. There is absolutely *nothing* in this record to comply with this requirement; and (2) If it is shown that it may become impracticable to secure the witness' presence by subpoena. The motion to quash filed by petitioner (R. 28-30) contains averments of facts concerning petitioner's residence and domicile in Philadelphia, Pennsylvania, to which no answer was filed by the Government, thereby admitting those averments; in the light of those facts it is equally obvious that the Govern-

(4) This section together with others, namely §§ 659 and 660, also repealed, which may assist in determining the scope of Rule 46(b) are printed in full in the Appendix (pp. 38-39).

ment also failed to show that it was or "may become" impracticable to serve petitioner with a subpoena.

In invoking the contempt statute, the Government relies upon clause 3 which impowers the Court to sentence for contempt for "Disobedience or resistance to its lawful writ, process, order, rule, decree, or command", 18 U. S. C. A. §401, and particularly upon "resistance", there being here no disobedience. But the most that can be said for the Government's proof was that its evidence shows *evasion, not resistance,* and the decisions clearly recite the difference. *Raymor Ballroom Co. v. Buck,* 110 F. 2d 207, 211 (C. A. 1st, 1940); *Berry v. Midtown Service Corp.,* 104 F. 2d 107 (C. A. 2d, 1939); *United States v. McDonald,* 8 Biss. 439, 448 (C. C. Wis., 1879); *United States v. Jose,* 63 Fed. 951, 954 (C. C. Wash., 1894); cf. *United States v. Huff,* 13 Fed. 630 (C. C. Tenn., 1882). See *State v. Welch,* 37 Wis. 196, 200-201, 203-204 (1875).

Petitioner objected to the arrest orally on the first occasion when he was afforded a hearing (R. 19). A written objection was subsequently timely filed (R. 28). When petitioner's motion and his request for a stay were overruled by the trial judge, he had no alternative but to proceed further. Having made his objection, his position was preserved for review. See *Albrecht v. United States,* 273 U. S. 1, 47 S. Ct. 250 (1927). Any other rule would render meaningless Rule 12 (b) of the Federal Rules of Criminal Procedure.

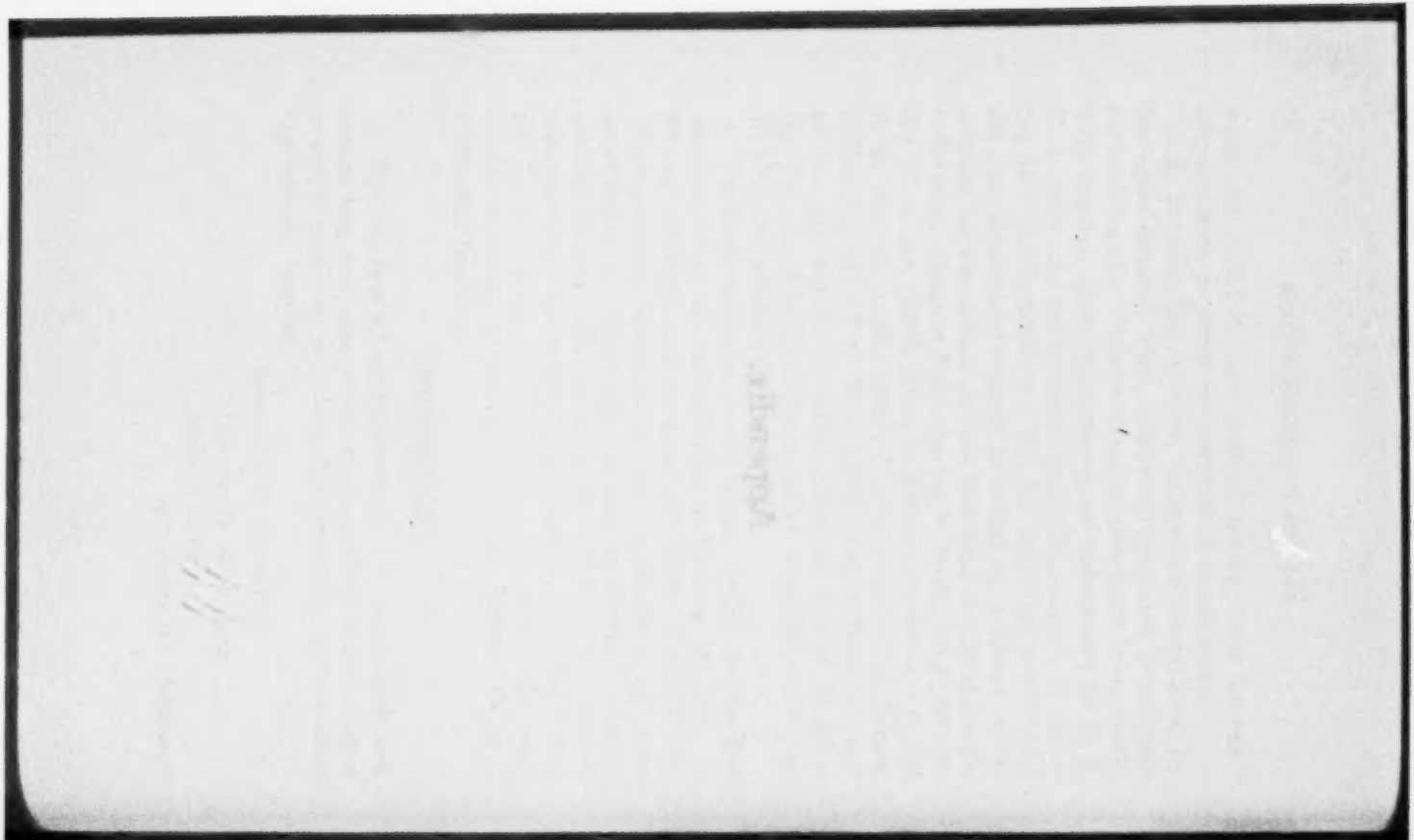
CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this case is one which justifies the granting of a writ of certiorari and thereafter reviewing and reversing the adverse decision.

Respectfully submitted,

LEMUEL B. SCHOFIELD,
MARVIN COMISKY,
Attorneys for Petitioner.

Appendix.



#1 1-2-3- 4-5-6-7- Record No. Photo 82309

Name Singleton, James Residence 1254 S.Hollywood St. Color white Age 25 1928

Alias James E. Singleton -James Evangels Singleton Nat. US

Arrested by Loyd & Hampton 17th Dist. Date of arrest 6/23/28 at 1254 Sa.Hollywood St. Arrested with

Charge Agg. A & B by shooting Michael Dorsey as he sat on steps at Napa & Wharton Sts. at 2/20 AM 6/23/28

Complainant Michael Dorsey, 65 yrs., SEcor 22nd & Dickinson St.

Magistrate Groves Disposition $1000. FH-7/23/28-discharged

Indicted Bill No. Court No. Date of trial

Verdict Disposition Name of prison

Judge Date of sentence Time expires

Reconsidered

LR

under James E Singleton 1254 S Hollywood St Age 24

Arrested by Ptlm Fisher 39th Dist Date of arrest 12-31-30, front 3231 E 16th St Arrested with

Charge Susp character

Complainant Ptlm Fisher

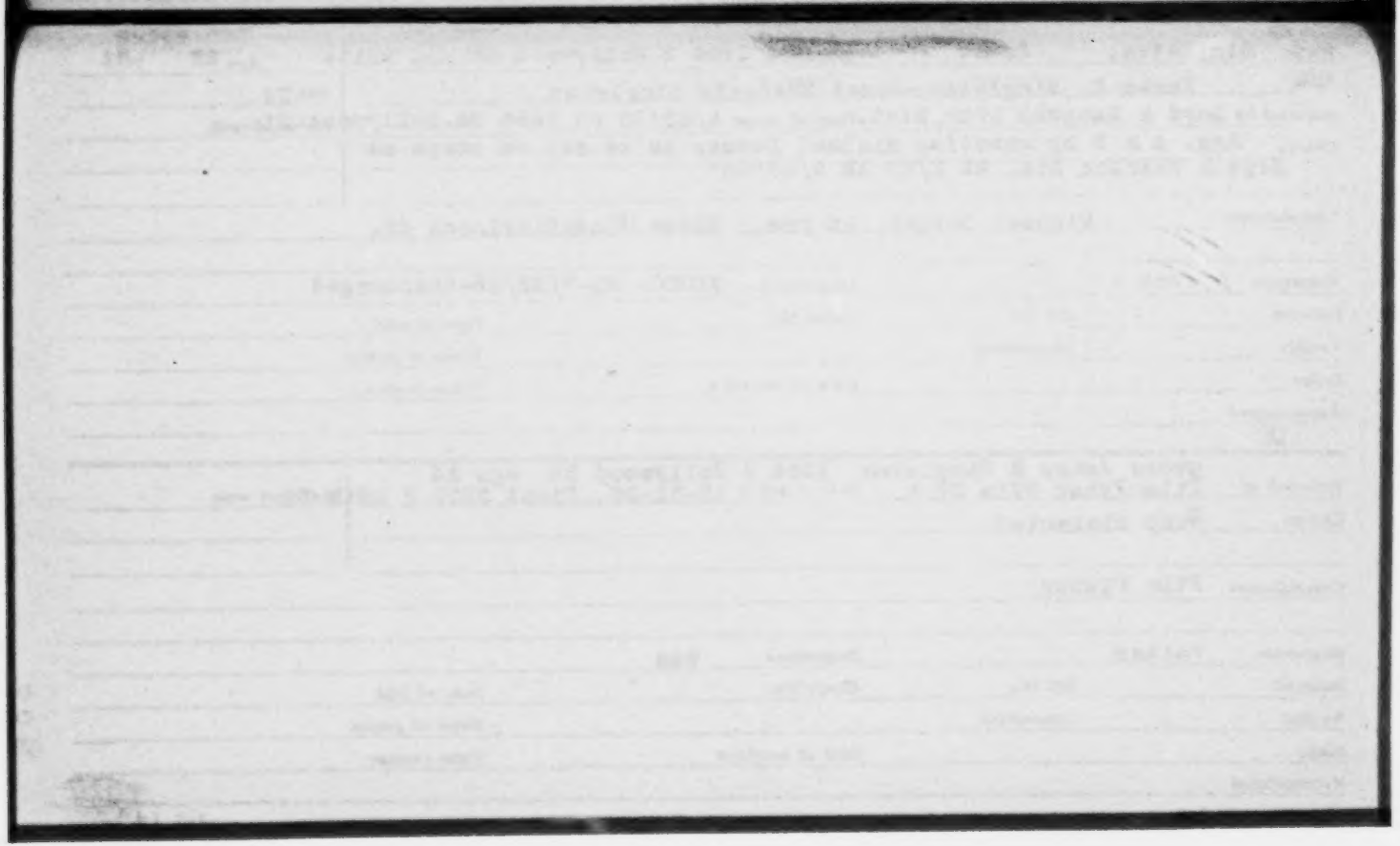
Magistrate Patton Disposition $10

Indicted Bill No. Court No. Date of trial

Verdict Disposition Name of prison

Judge Date of sentence Time expires

Reconsidered



[redacted] Record No. Photo 26209

Name Singleton James Residence 1254 S.Hollywood St. Color White Age 24 19 52

Alias

Arrested by Ptlmn.Schey-Motor "B" Date of arrest 1-7-52-25th & Grays Ferry

Charge Suspicious character in auto

Complainant Ptlmn. Desmond-Motor "B"

Nat. U.S.

Arrested with

Magistrate Connor Disposition Discharged

Indicted Bill No. Court No. Date of trial

Verdict Disposition Name of prison

Judge Date of sentence Time expires

Reconsidered

S.S.

1537 W. Passyunk Ave age 24

Arrested by Det. Foley 21st Dc Date of arrest 5-15-34, 1354 S. Hollywood St. Arrested with

Charge Robbery bybholdup at point of gun- Deft. was identified as one of the 3 men who heldup Pros. who was on a truck & took truck away from him & drove off with 28 crates of eggs val $252.00 not insured

Complainant Albert Wilson, 1445 N. Marston St. driver
Max Rosen 4733 Sansom St. (owner of truck)

Magistrate Hamberg Disposition $10,000. B.F.H.5-23-34 Dis.

Indicted Bill No. Court No. Date of trial

Verdict Disposition Name of prison

Judge Date of sentence Time expires

72 RECORD NO. PHOTO 82309

Name Singleton James Residence 1537 Passyunk Ave Color White Age 29 19 34

Alias Nat. US

Arrested by Det. Flammer D.B. Date of arrest 7-11-34, Oakford & Hellywood Sts.

Charge Robbery by ho.dup at point of gun- Deft. took a truck at point of gun

Complaintant William Simmler D.B.

Magistrate Roberts Disposition Dis.

Indicted Bill No. Court No. Date of trial

Verdict Disposition Name of prison

Judge Date of sentence Time expires

Reconsidered

SMB

1254 S Hollywood St s e 27

Arrested by Sgt Milroy 33rd Dist Date of arrest 3-11-35 15th and Ellsworth St Arrested with

Charge Violation of the Penna State Liquor Control Act - confs 5 gallons of white liquor

Complaintant Ptlmapplegate and Sgt Milroy Meter B 33rd Dist

Magistrate Girard Disposition Turned over to Federal Auth -USM-Phila.6351 $500 bail count

Indicted Bill No. Court No. Date of trial

Verdict Disposition Name of prison

Judge Date of sentence Time expires

Reconsidered

C2

RECORD NO. PHOTO 82309

Name Singleton James Residence 2432 Fitzgerald St. Color White Age 31 19 38

Alias Nat.

Arrested by Ptlm.Howley-32nd.Dist. Date of arrest 11-26-38-3134 S.84th.St. Arrested with

Charge Freq.Gambling House & Dis.Conduct;- Jack Beyer 172365 et.al.

Complainant Ptlm.Bowen-32nd.Dist.

Magistrate Dogole Disposition Dis.

Indicted Bill No. Court No. Date of trial

Verdict Disposition Name of prison

Judge Date of sentence Time expires

Reconsidered

TN. see sheet Jack Beyer

2432 Fitzgerald St. 44 yrs.

Arrested by Det.Murphy Vice Sqd. Date of arrest 10-18-39 1245 S. Hollywood Arrested with

Charge Setting up and Maint. Ill. Lottery - Number Bank - A. & B. by fist on Ptl. Resisting Arrest.

Complainant Det. Bowan - Iannarelli Vice Sqd.

$300 Bail Keep Peace 1 year

Magistrate Girard Disposition Discharged on Numbers 10-19-39

Indicted Bill No. Court No. Date of trial

Verdict Disposition Name of prison

Judge Date of sentence Time expires

262

[redacted] 1 2 ● 4 5 6 7 8 9 10 11 12 13 14 15 16 [redacted] 82309

Name Singleton James Color White Age 36 1942

Address 1254 S. Hollywood St.

Alias

Arrested by Sgt. Ferguson Vice Sqd.

Date of Arrest 5-28-42

Place of Arrest Wharton St. bet. 22nd & 23rd Sts.

Charge Setting up & Maintaining an unlawful lottery & resisting arrest & reckless driving & A. & B. on an officer- Deft. was transporting number slips from his auto & Catherine Mariennilla w ulf ride with him to avoid suspicion & officers trapped the deft. while he was operating his auto & boarded the running board of car & deft. pushed the officer from car & lost control of car & finally brought to a stop

Complainant Det. Perkolup & Plm. Walls & Christine Vice Sqd.

Photo No.

F. B. I. No. 901998

P. M. P. No. 135316

Registered

Arrested with 192084 Catherine Mariennilli

Arrest 11-4-42

Magistrate O'Malley

Indicted 6/1942

Court No. 296

Verdict pl guilty all bills

Date of Sentence 11-13-42

Judge Crumlish

District Attorney

Disposition $2000. court

Bill No. 41 42 and 48 49

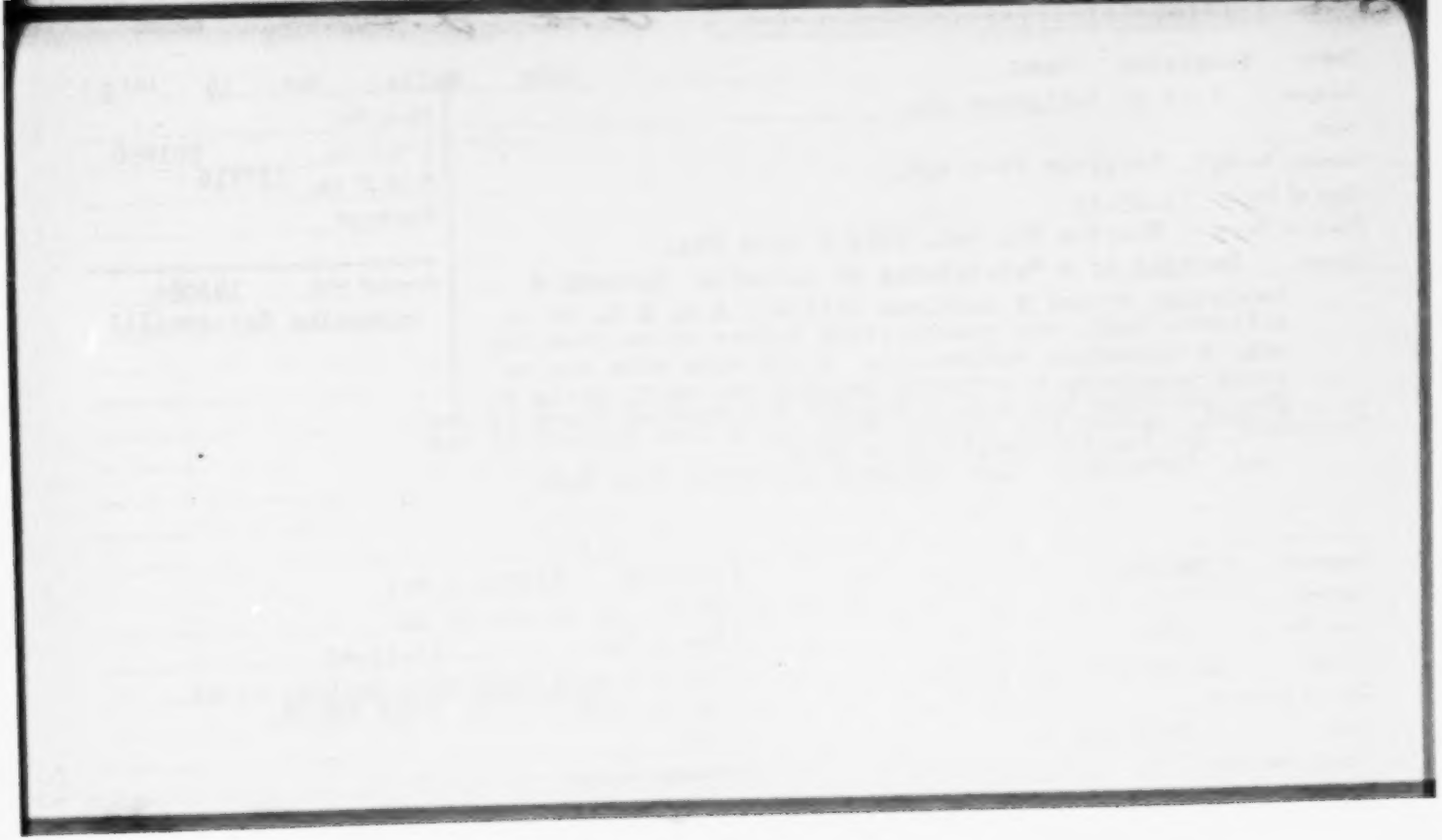
Date of Trial 11-13-42

Disposition sent susp bill 41 42 $250 Fine bills 48 49

Exp. Min. Date Exp. Max. Date

Prison

Defense Attorney



#82309

Name Singleton James Color white Age 38 194 4

Address

Alias under James Evangels Singleton

Arrested by PSP-Essington,Pa.

Date of Arrest . 8/10/44

Place of Arrest Essington, Pa.(Court House Media, Pa.#10647)

Charge Selling Lottery Tickets

Arrested with

Complaintant

Magistrate

Indicted

Court No.

Verdict

Date of Sentence

Judge

District Attorney

Paroled

Disposition

Bill No.

Date of Trial 10/6/44

Disposition 6 to 12 mos. sent.susp. upon payment of fine and costs

Exp. Min. Date . Exp. Max. Date

Prison

Defense Attorney

(arrested 10-18-44-Del Co.,Court House Media) - consp lottery 1-3-45 not guilty order of court)

emg per PSP 8/17/44

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15

Name Singleton James Color White Age 40 194

Address 1254 S Hollywood St.

Alias

Arrested by Sgt Ferguson etal Vice Sq.

Date of Arrest 1-26-46

Place of Arrest 1254 S Hollywood St.

Charge Setting up and maintaining illegal lottery -

Photo No.

F. B. I. No.

P. M. P. No.

Registered

Arrested with

Complainant

Magistrate Williams

Indicted

Court No.

Verdict

Date of Sentence

Judge

District Attorney

Paroled hw

Disposition dis.

Bill No.

Date of Trial

Disposition

Exp. Min. Date Exp. Max. Date

Prison

Defense Attorney

P 687

1 2 3 4 ● 6 7 8 9 10 11 12 13 14 15

82309

Name Singleton James Color white Age 40 194

Address 1254 S Hollywood St

Alias

Arrested by Sgt Ferguson-Perkolup VS

Date of Arrest 5-7-46

Place of Arrest 1254 S Hollywood St

Charge Setting up,and main an illegal lottery

Photo No.

F. B. I. No.

P. M. P. No.

Registered

Arrested with

Complaintant

Magistrate O'Malley

Indicted

Court No.

Verdict

Date of Sentence

Judge

District Attorney

Paroled

Disposition Dis

Bill No.

Date of Trial

Disposition

Exp. Min. Date Exp. Max. Date

Prison

Defense Attorney

P 887

[redacted]

#82309

Name Singleton James Color white Age 194

Address

Alias

Arrested by

Arrested with

Date of Arrest 10/22/46

Place of Arrest Delaware Twp.,Erlton,NJ #2637

Charge Fail. to Reg. as Crim.

Complainant

Magistrate

Indicted

Court No

Verdict

Date of Sentence

Judge

District Attorney

Paroled

Disposition

Bill No.

Date of Trial

Disposition Fined $100 and costs.

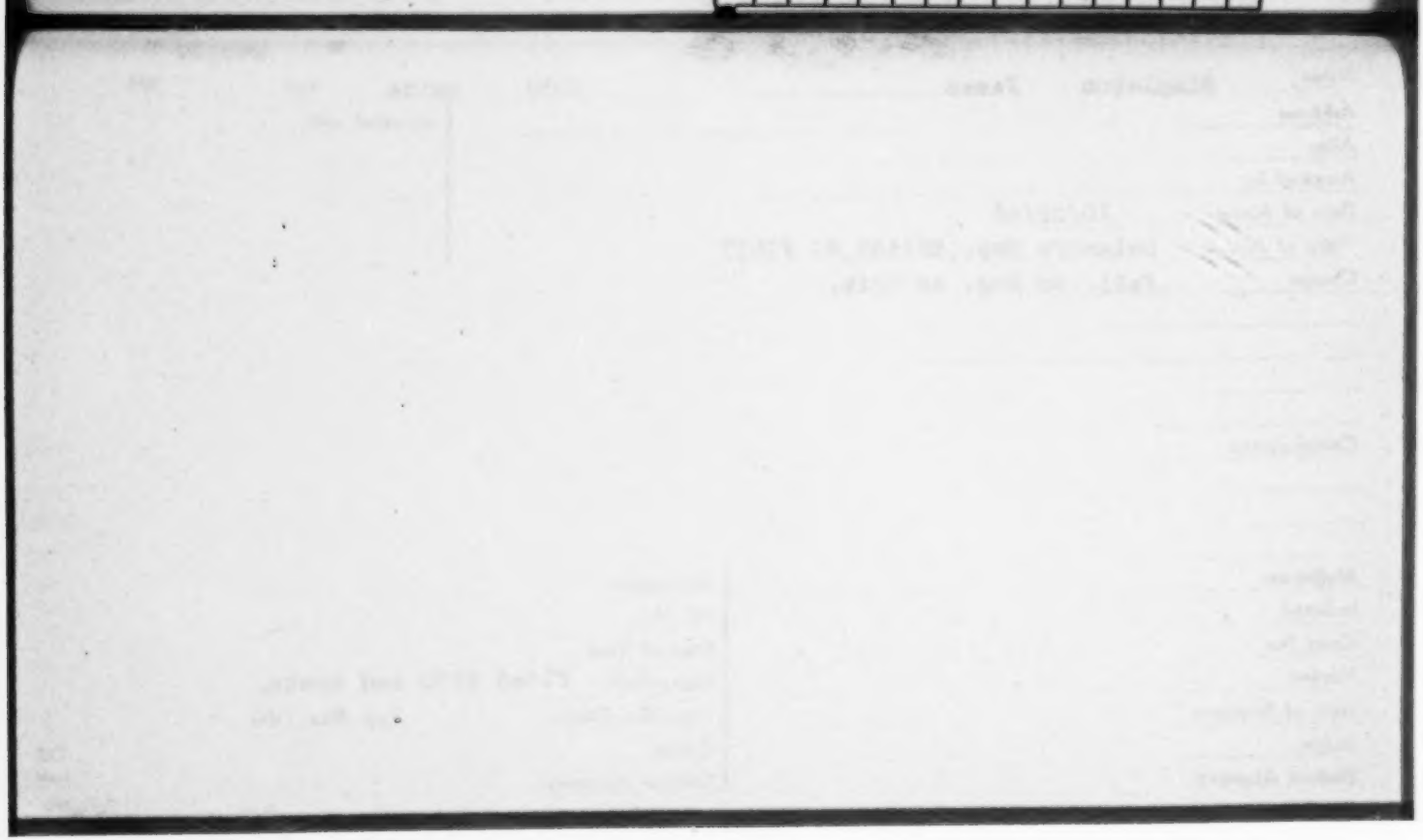
Exp. Min. Date Exp. Max. Date

Prison

Defense Attorney

emg per St.House,Trenton,NJ 11/2/46

[redacted]



1 2 3 4 5 6 7 8 9 10 11 12 13 14 15

82369

Name Singleton James Color White Age 41 194 7

Address 1254 S. Hollywood St.

Alias

Arrested by Sgt. Peltz & Det. Kelly D.B.

Date of Arrest 3-27-47

Place of Arrest 1339 Warfield St.

Charge Setting up & Maintaining an unlawful lottery 65000 number plays was confiscated

Photo No.

F. B. I. No.

P. M. P. No.

Registered

Arrested with 220836
Anthony DiFabrisio
Louis J. Tomasselli 220837

Complaintant Det. Peltz & Iannerelli D.B.

Magistrate O'Malley

Indicted

Court No.

Verdict

Date of Sentence

Judge

District Attorney

Paroled

Disposition $10,000 bail f. h. 4/3/47
Bill No. 4/3/47 $1500 bail - advisement
5/2/47 Discharged.

Date of Trial

Disposition

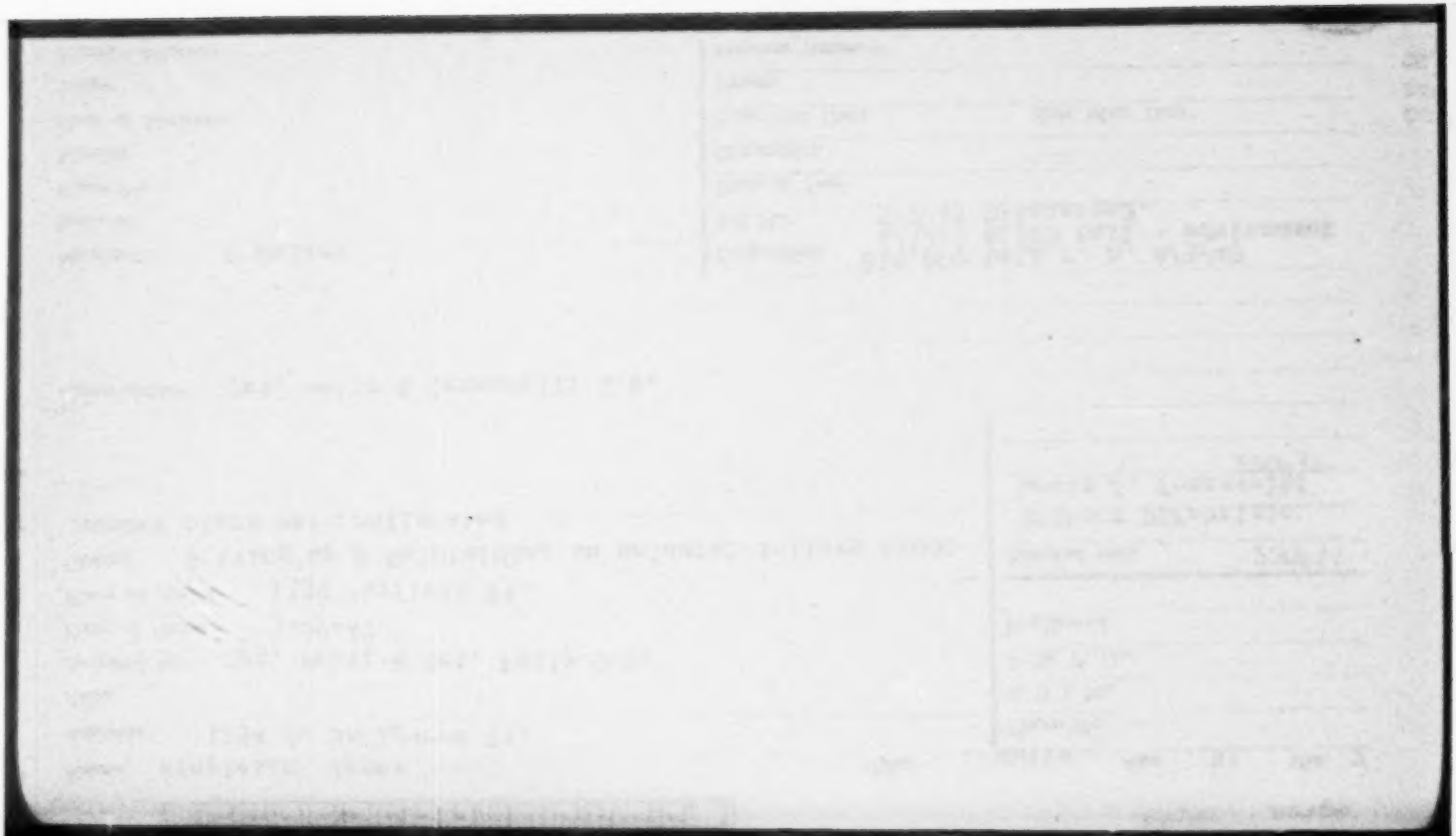
Exp. Min. Date Exp. Max. Date

Prison

Defense Attorney

SEE sheet on Anthony DiFabrizio

32



1 2 3 4 5 6 ● 8 9 10 11 12 13 14 15

82309

Name Singleton, James Color white Age 41 194

Address 1254 S Hollywood St

Alias

Arrested by Ptlm Durham-Scott Vice Sq

Date of Arrest 6-18-47

Place of Arrest 1254 S Hollywood St

Charge Setting up and main an illegal lottery

Photo No.

F. B. I. No.

P. M. P. No.

Registered

Arrested with

Complaintant

Magistrate O'Malley

Indicted

Court No.

Verdict

Date of Sentence

Judge

District Attorney

Paroled

Disposition Discharged

Bill No.

Date of Trial

Disposition

Exp. Min. Date Exp. Max. Date

Prison

Defense Attorney

[redacted]

[redacted]

Name Singleton James Color White Age 41 194

Address 1254 S Hollywood St.,

Alias

Arrested by Lt Leinhauser-Det Leitz-Regler-Iannarelli H.D.,

Date of Arrest 9-16-47

Place of Arrest 17th & Federal St.,

Arrested with

Charge Violation Pitkin Firearm Act., C.C. & Weapons-loaded revolver with mutilated numbers - H.&S. Code

Complaintant Rex Refining Co., 61st & Eastwick Ave., George Kernblatt

Magistrate Dogole

Indicted 9/1947

Court No 653

Verdict P1.G.1073-1074-Demurr.Sust.on B.1072

Date of Sentence 10-27-47

Judge Harry J. McDevitt

District Attorney

Paroled

Disposition $2000 - court

Bill No. 1073 to 1074

Date of Trial 10-27-47

Disposition Sentence Suspended on B.1073-1074

Exp. Min. Date Exp. Max. Date

Prison

Defense Attorney

hg

mo

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15

82309

Name Singleton James Color White Age 42 194 8

Address 1254 S. Hollywood St/

Alias

Arrested by Det. Iannarelli & Napoli D.B.

Date of Arrest 2-4-48

Place of Arrest Pt. Breeze Ave. & Wharton St.

Charge Setting up & maintaining an unlawful lottery & conspiracy

Photo No.

F. B. I. No.

P. M. P. No.

Registered

Arraigned with

William Riddle 43847

William D. Owens 20972

5

Complainant

Magistrate Roberts

Indicted 2-1948

Court No. R.#296

Verdict Waived Jury trial adj.guilty 466 adj.not guilty 467

Date of Sentence 6-9-48

Judge Harry S. McDevitt

District Attorney

Paroled

Disposition $5000. court

Bill No. 466-467

Date of Trial 6-9-48

Disposition Fined $100.00

Exp. Min. Date Exp. Max. Date

Prison

Defense Attorney

SMB

CC

FEDERAL RULES OF CRIMINAL PROCEDURE.

RULE 12. PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS.

. . .

(b) *The Motion Raising Defenses and Objections.*

(1) *Defenses and Objections Which May Be Raised.* Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

RULE 46. BAIL.

. . .

(b) *Bail for Witness.* If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail . . .

UNITED STATES STATUTES.

28 U. S. C. A. § 657, R. S. § 879, Repealed by Act of June 25, 1948, c. 645, § 21, 62 Stat. 862, eff. Sept. 1, 1948.

§ 657. *Same; recognizance; at hearing of charges in criminal cases.* Any judge or other officer who may be authorized to arrest and imprison or bail persons charged with any crime or offense against the United States may, at the hearing of any such charge, require of any witness produced against the prisoner, on pain of imprisonment, a recognizance, with or without sureties, in his discretion, for his appearance to testify in the case. And where the crime or offense is charged to have been committed on the high seas, or elsewhere within the admiralty and maritime jurisdiction of the United States, he may, in his discretion, require a like recognizance, with such sureties as he may deem necessary, of any witness produced in behalf of the accused, whose testimony in his opinion is important, and is in danger of being otherwise lost. (R. S. § 879.)

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28 U. S. C. A. § 659, R. S. § 881, Repealed by Act of June 25, 1948, c. 645, § 21, 62 Stat. 862, eff. Sept. 1, 1948.

§ 659. *Same; recognizance; when required.* Any judge of the United States, on the application of a district attorney, and on being satisfied by proof that the testimony of any person is competent and will be necessary on the trial of any criminal proceeding in which the United States are parties or are interested, may compel such person to give recognizance, with or without sureties, at his discretion, to appear and testify therein; and, for that purpose, may issue a warrant against such person, under his hand,

with or without seal, directed to the marshal or other officer authorized to execute process in behalf of the United States, to arrest and bring before him such person. If the person so arrested neglects or refuses to give recognizance in the manner required, the judge may issue a warrant of commitment against him, and the officer shall convey him to the prison mentioned therein. And the said person shall remain in confinement until he is removed to the court for the purpose of giving his testimony, or until he gives the recognizance required by said judge. (R. S. § 881.)

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28 U. S. C. A. § 660, Act of March 3, 1887, c. 397, § 2, 24 Stat. 635, Repealed by Act of June 25, 1948, c. 645, § 21, 62 Stat. 862, eff. Sept. 1, 1948.

§ 660. *Same; attachment without previous subpoena in certain prosecutions.* In any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, whether before a United States commissioner, justice, judge, a grand jury, or any court, an attachment for any witness may be issued by the court, judge, or commissioner, without a previous subpoena, compelling the immediate attendance of such witness, when it shall appear by oath or affirmation, to the commissioner, justice, judge, or court, as the case may be, that there is reasonable ground to believe that such witness will unlawfully fail to obey a subpoena issued and served in the usual course in such cases; and in such case the usual witness fee shall be paid to such witness so attached. The person so attached may at any time secure his or her discharge from custody by executing a recognizance with sufficient surety, conditioned for the appearance of such person at the proper time, as a witness in the cause or proceeding wherein the attachment may be issued. (Mar. 3, 1887, c. 397, § 2, 24 Stat. 635.)

18 U. S. C. A.

§ 401. Power of Court.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions:

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

United States Constitution, Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.